and judgment in default had been entered against the defendant who had paid up the judgment sum, interest and costs without objecting to the late completion and without raising the issue of the liquidated and ascertained damages.

In *Yeow Kim Pong Realty Ltd* v *Ng Kim Pong*[1] the Privy Council held 'that where a party accepts performance without such agreement that party may not in a subsequent action claim compensation for non-performance at the time agreed unless at the time of accepting performance he has given notice of his intention to do so.'

In *Sim Chio Huat* v *Wong Ted Fui*[2] the Federal Court compared s 56 of the Contracts Act 1950 to the position arrived at common law. They went on to state that 'in a contract in which time is of the essence, when a party fails to perform it by the stipulated time, the innocent party has the right either to rescind the contract or to treat it as still subsisting. If he treats it either expressly or by conduct as still continuing, the contract exists but time ceases to be of the essence and becomes at large. Consequently he cannot claim the liquidated damages under the contract unless there is a provision as to the extension of time. However, this cessation can be revived and so time can be restored to be of the essence by the innocent party serving a notice to the party in default giving a new date of completion.' In that case there was no provision for extension of time as in the present case but the defendant here never gave notice to the plaintiff as to the revival of the fact that time is of the essence, having acquiesced in the earlier delays caused by their delayed payments and having paid the judgment sum for the ninth and tenth payments after a default judgment without claiming for liquidated and ascertained damages.

On these facts and on the authorities cited, I would hold that time was no longer the essence of the contract and the defendant was not entitled to the liquidated and ascertained damages as the court is not in a position to ascertain when the claim for damages should commence. As the parties have agreed that the plaintiff is entitled to the amounts claimed, I would therefore give judgment for the plaintiff as prayed with costs in both civil suits and dismiss the defendant's counterclaim with costs.

Application allowed.

Solicitors: *Joseph Tan & Tang; Kamaluddin Maamor & Co.*

Reported by *Prof Ahmad Ibrahim*

Dato Haji Abdul Malik bin Haji Ahmad & Anor v Registrar of Societies, Malaysia

HIGH COURT (KUALA LUMPUR) – ORIGINATING SUMMONS NO R8-32-48-88
AJAIB SINGH J
14 MAY 1988

Civil Procedure – Order of certiorari against cancellation of registration of UMNO as a society – Leave to apply for – Application for leave made 28 days out of time – Delay to be accounted for to satisfaction of court – Whether applicants have done so – Applicants cannot claim to be ignorant of their rights – Rules of the High Court 1980, O 53 rr 1(2) & 1A

Societies – Cancellation of registration of UMNO as a society – Leave to apply for order of certiorari – Application for leave made 28 days out of time – Delay to be accounted for to satisfaction of court – Whether applicants have done so – Applicants cannot claim to be ignorant of their rights – Rules of the High Court 1980, O 53 rr 1(2) & 1A

The applicants sought leave to apply for an order of certiorari against the respondent under O 53 r 1(2) of the Rules of the High Court 1980 to quash the decision of the respondent dated 12 February 1988 whereby he had cancelled the registration of UMNO as a society. The applicants filed several affidavits giving their reasons for the delay.

Held, dismissing the application:

(1) Order 53 r 1A of the Rules of the High Court 1980 provided that leave should not be granted to apply for an order of certiorari unless the application for leave was made within six weeks after the date of the proceeding or the delay was accounted for to the satisfaction of the court or judge to whom the application was made.

(2) The present application for leave to apply for an order of certiorari was filed on 22 April 1988, some 28 days out of time. The court was not satisfied that the applicants had accounted for the delay in making their application.

(3) The reasons which the applicants put forward for the delay were considered rather flimsy and they could not claim to be ignorant of their rights if they were minded to have the registrar's decision quashed.

Legislation referred to
Rules of the High Court 1980 O 53 rr 1(2), (3), 1A

Dato Haji Abdullah bin Ngah for the applicants.

Cur Adv Vult

Ajaib Singh J: The applicants in this case sought leave to apply for an order of certiorari against the respondent under O 53 r 1(2) of the Rules of the High Court 1980 to quash the decision of the respondent dated 12 February 1988 whereby he had cancelled the registration of UMNO as a society. Notice of the application was duly given to the Attorney General's Chambers and copies of the requisite statement and affidavits were lodged in those chambers pursuant to O 53 r 1(3). The Attorney General, however, did not thereby become a party in the proceedings for the hearing of the application for leave.

But when the case was called up the learned Attorney General Tan Sri Abu Talib Othman was present and I allowed him to make a submission in the application.

Order 53 r 1A provides, inter alia, that leave shall not be granted to apply for an order of certiorari unless the application for leave is made within six weeks after the date of the proceeding or the delay is accounted for to the satisfaction of the court or judge to whom the application is made. The present application for leave to apply for an order of certiorari was filed on 22 April 1988 – some 28 days out of time. The applicants had therefore to account for the delay to the satisfaction of the court. The reasons for the delay as can be gathered from the statement and affidavits filed by the applicants are as follows:

(a) The respondent's order of 12 February 1988 was addressed to the Secretary General of UMNO. The applicants, being outstation members of UMNO, were not aware of this official order until very recently though they knew that UMNO was held unlawful by the Kuala Lumpur High Court on 4 February 1988.

(b) That due to the national importance of UMNO to the government of Malaysia and the people especially to its more than one million members, the Secretary General of UMNO would have either appealed against the decision of the respondent to the Minister of Home Affairs who was and is in fact the President of UMNO at the time of its cancellation or apply to the High Court for an order of certiorari to quash the order of the respondent dated 12 February 1988 for infringing the norms of natural justice or committing errors of jurisdiction as the case may be. When the applicants found that nothing was done by the said Secretary General they immediately instructed their solicitors to apply for certiorari on their behalf albeit out of time.

To the above reasons for the delay the first applicant adds the following in his further affidavit:

(i) The Secretary General was appointed by the President as the UMNO special officer for the administration of the main office in Kuala Lumpur and he was directly responsible to the President. Therefore as an ordinary member of UMNO who was not involved in the day to day functions of the Supreme Council of UMNO he (the first applicant) would not know what was going on inside the Supreme Council itself or even in the main office. For instance he would not know why or how or when the Secretary General was served with a notice by the respondent to show cause why the registration of UMNO should not be cancelled and what sort of reply was given by the Secretary General and the ultimate result of the proceedings unless the Secretary General had taken the trouble to give wide publicity to all the sections and branches of UMNO throughout the country which he never did.

(ii) The first applicant only came to know just generally of what had actually happened to UMNO through the newspapers but he never knew in detail as to what kind of notice was given by the respondent or what sort of reply was given by the Secretary General and what kind of order was made by the respondent against UMNO. He only came to know the details of it all during the second week of April 1988 at a lunch party held at the residence of Tan Sri Osman (the second applicant) in Kuala Lumpur where he (the first applicant) was shown copies of all the documents concerned. Only after consulting his lawyers then did he realize that the entire proceedings taken by the respondent were bad in law and as a result was advised that he should seek necessary legal remedies promptly before it was too late in order to save UMNO.

I am afraid I am not at all satisfied that the applicants have accounted for the delay in making their application for leave for an order of certiorari which they seek against the Registrar of Societies. UMNO was declared an unlawful society by the High Court on 4 February 1988. On 12 February 1988, the Registrar of Societies cancelled the registration of UMNO and this was duly gazetted on 15 February 1988. This gazette notification is official notification to all and sundry that UMNO is cancelled.

The reasons which the applicants have put forward for the delay are rather flimsy. The applicants are politicians of some standing having held important political posts in UMNO and in the government. The first applicant has been a member of the Ayer Tawar branch of UMNO since 1954 and was the head of the Bruas branch of UMNO and deputy chairman of the State Liaison Committee till 1987. He is at present the speaker of the Perak State Assembly. The second applicant joined UMNO in 1946 and was the head of the Pagoh branch from 1946-84 and liaison officer for Johore from 1967-81 and served as Menteri Besar Johore during this period 1967-81.

The applicants cannot claim to be ignorant of their rights if they were minded to have the Registrar's decision quashed. They ought to have acted promptly within the time allowed by the Rules of the High Court 1980. And legal advice for them was surely within easy reach. Their application for leave to apply for an order of certiorari must therefore fail in limine and it is accordingly dismissed.

Application dismissed.

Solicitors: *Yusof, Abdullah & Partners.*

Reported by *Ng Sheau Jiuan*